

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 21, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP608**

**Cir. Ct. No. 2009CF254**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RONALD S. DEPAOLI,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Shawano County:  
WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Ronald DePaoli appeals an order denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion for a new trial alleging he received ineffective assistance from his postconviction counsel. We affirm.

¶2 DePaoli was convicted of repeated sexual assault of the same child, his stepdaughter. At trial, the victim testified that DePaoli had sexual intercourse with her at least ten times during a three-year period beginning when she was twelve years old. The victim provided details regarding five instances, and she described a pattern of sexual assault on weekends when her mother was not at home.

¶3 DePaoli sought postconviction relief seeking to vacate the conviction and also filed a direct appeal. In both, he argued ineffective assistance of his trial counsel for failing to object to: (1) allegedly inconsistent jury instructions; (2) the victim's mother testifying that she believed her daughter; and (3) an expert witness who "was implicitly saying ... that the complainant was telling the truth." We affirmed the conviction. *See State v. DePaoli*, No. 2012AP174-CR, unpublished slip op. (WI App Nov. 27, 2012).

¶4 DePaoli subsequently filed a motion for a new trial pursuant to WIS. STAT. § 974.06, alleging he received ineffective assistance from his postconviction counsel based on counsel failing to raise additional ineffective assistance of trial

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise stated.

counsel claims.<sup>2</sup> The circuit court denied the motion after a hearing, and DePaoli now appeals the denial of his § 974.06 postconviction motion.

¶5 Generally, appeals from a circuit court’s denial of a WIS. STAT. § 974.06 postconviction motion are procedurally barred from this court’s review unless the defendant can provide a sufficient reason for not raising his current claims for relief in his original postconviction motion or his direct appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). A claim of ineffective assistance of postconviction counsel can provide a sufficient reason to overcome the *Escalona* bar if the defendant can show that the claims alleged in the § 974.06 motion are clearly stronger than those counsel actually raised. *See State v. Romero-Georgana*, 2014 WI 83, ¶46, 360 Wis. 2d 522, 849 N.W.2d 668.

¶6 On this appeal, DePaoli contends his postconviction counsel was ineffective for failing to raise the following two claims of ineffective assistance of trial counsel: (1) trial counsel failed to move to strike a biased juror; and (2) trial counsel failed to present witnesses who could have called into question the victim’s credibility. DePaoli insists “it is evident that the claims that were not brought are stronger” than those postconviction counsel actually raised.

¶7 Regarding DePaoli’s first complaint, he argues that his trial counsel should have moved to strike a juror during voir dire because the juror showed

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<sup>2</sup> In his WIS. STAT. § 974.06 motion and his brief to this court, DePaoli characterizes his claim as one of ineffective assistance of appellate counsel. Because DePaoli is actually challenging his counsel’s performance in his postconviction capacity, we refer to DePaoli’s claim as one of ineffective assistance of postconviction counsel. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678-79, 556 N.W.2d 136 (Ct. App. 1996).

subjective bias. According to DePaoli, the juror “advocated a lynch mob.” A prospective juror is subjectively biased, and should be removed for cause, if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge they may have. *State v. Mendoza*, 227 Wis. 2d 838, 848, 596 N.W.2d 736 (1999).

¶8 DePaoli’s second complaint of ineffective assistance of postconviction counsel argues that his postconviction counsel should have challenged trial counsel’s decision not to introduce evidence from DePaoli’s mother and brother to undercut the victim’s credibility. DePaoli asserts his mother “was ready to testify that the mother of the victim had threatened the victim and the victim’s brother to get them to testify against [DePaoli].” DePaoli further contends his brother would have testified that he observed an encounter where the victim stated that she wished to change her story and tell the truth, and the victim’s mother threatened to harm the victim “if she did that.”

¶9 However, we need not determine whether the claims DePaoli raises in his WIS. STAT. § 974.06 motion are clearly stronger than the claims that his postconviction counsel actually raised. DePaoli’s present appeal suffers from a more critical deficiency: DePaoli cannot establish that his trial counsel actually was ineffective because he failed to produce his trial counsel at the postconviction *Machner* hearing.<sup>3</sup>

¶10 To demonstrate ineffective assistance of postconviction counsel based on failure to raise claims of ineffective assistance of trial counsel, DePaoli

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<sup>3</sup> Referring to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

bears the burden of proving that his trial counsel was actually ineffective. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. It is thus a prerequisite to a successful postconviction challenge on the basis of ineffective assistance of trial counsel to preserve the testimony of trial counsel. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). This requirement is critical not only to give trial counsel a chance to explain his or her actions, but also to allow the circuit court, which is in the best position to judge counsel's performance, to rule on the motion. *Id.* at 554. The absence of trial counsel's testimony at the postconviction *Machner* hearing therefore precludes further review of trial counsel's performance.<sup>4</sup> *See id.* at 555.

¶11 Accordingly, we conclude DePaoli has failed to satisfy his burden of proving his postconviction counsel's ineffectiveness by failing to produce DePaoli's trial counsel at the postconviction *Machner* hearing, and we reject DePaoli's claims on this ground. *See State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied on by the circuit court.)

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<sup>4</sup> We note DePaoli failed to file a reply brief in this court, despite our order dated January 4, 2017, granting DePaoli's motion for an extension of time to file a reply brief. DePaoli therefore provides no explanation why his trial counsel could not have testified at the postconviction *Machner* hearing conducted on December 9, 2014. During that hearing, postconviction counsel stated that he "attempted to" subpoena trial counsel, but did not explain why that attempt failed or why successfully subpoenaing trial counsel was not possible. In fact, DePaoli's trial counsel testified at the original postconviction proceedings on January 3, 2012. However, he did not address the issues raised by DePaoli in the present appeal. During that testimony, trial counsel stated, "I have been retired for over a year now ...." The prosecutor also observed that "I have seen [trial counsel] in the community here from time to time so I am not sure why he couldn't be brought in."

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

